ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

FURTHER COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI TELECOMMUNICATIONS CORPORATION

Frank W. Krogh
Mary L. Brown
1801 Pennsylvania Ave., N.W.
Washington, DC 20036
(202) 887-2372

Its Attorneys

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TABLE OF CONTENTS

SUMMARY

It is important for the Commission to set forth CPNI rules in this proceeding that recognize the interrelationship of Section 222 with Sections 201(b), 202(a) and 272 of the Communications Act. Such rules are necessary to prevent the BOCs' and other incumbent LECs' discriminatory and anticompetitive practices, as experienced by MCI, involving their use of customer information while denying others access to such information.

In order to provide background for MCI's answers to the questions raised in the Bureau's Notice, it is first necessary to respond to some of the BOCs' and AT&T's ex parte filings. They have presented several theories that would eviscerate Section 222. They argue that Section 222 was intended primarily as a privacy measure and not to promote competition. Under their interpretation, that provision protects CPNI from disclosure to other entities but not from use by carriers that already possess it. They would carry out their goals for Section 222 by treating all telecommunications services as "the telecommunications service from which such [CPNI] is derived" under Section 222(c)(1) or, alternatively, by viewing Section 222(c)(1) primarily as a vehicle to gain easy access to CPNI by carriers that already possess it while requiring other entities to obtain written authorization under Section 222(c)(2) in order to gain access to such CPNI.

The BOCs' and AT&T's approaches ignore the competitive

concerns reflected in Section 222, including Section 222(c)(1). In fact, the Senate bill provision from which Section 222 was drawn was intended to restrict BOC and BOC affiliates' use of CPNI they already possess. In adopting that Senate provision with modifications, Section 222 was intended to apply similar protections to CPNI possessed by all carriers, rather than to provide less protection to CPNI in the hands of the BOCs. The BOCs thus have it backwards in arguing that the main focus should be on protecting CPNI from disclosure to other entities. Carriers' exploitation of CPNI they already have is one of the primary threats to the competitive goals of the 1996 Act generally and to Section 222 in particular, as well as to privacy. The restrictions of Section 222(c) were thus intended to be applied on an intracompany basis as much as between carriers, as shown by the restriction on "use" of CPNI in Section 222(c)(1). At the same time, the word "disclose" in that provision also shows that it was intended to allow disclosure of CPNI to other entities, while "written authorization" under Section 222(c)(2) requires such disclosure.

Putting all services into one "bucket" would nullify Section 222, since there would be no restrictions on the use of CPNI. The same result would follow from the use of a "notice and opt-out" approval process under Section 222(c)(1). These techniques would frustrate the overriding legislative goal of limiting the use of CPNI by carriers already possessing it in order to promote competition.

MCI's responses to the specific questions reflect these general concerns. Thus, in situations where disclosure of CPNI is allowed but not required by Section 222 -- such as where the customer has approved under Section 222(c)(1) or where CPNI is needed to initiate service under Section 222(d)(1) -- Section 272(c)(1) requires that whatever procedures are followed with regard to the use of CPNI by a BOC on behalf of its separate affiliate or its disclosure to the separate affiliate must also be followed with regard to the disclosure of CPNI to any other entity.

Moreover, Sections 201(b) and 202(a) impose similar requirements on the BOCs, even prior to the creation of a separate affiliate or obtaining in-region authority. It would be an anticompetitive practice under Section 201(b) and unreasonably discriminatory under Section 202(a) for a BOC to deny IXCs access to CPNI where disclosure would be allowed and then to alter its disclosure practices once it received in-region authority and established a separate affiliate. Its change in practices might benefit other IXCs as well, but the main beneficiary would be its affiliate, and that would be the only motivation for the change. Thus, a BOC that has refused or refuses to disclose CPNI to another entity where Section 222 allows, but does not require, disclosure must continue to follow the same approach with regard to disclosure to its own affiliate. Moreover, the same rule should apply to a BOC's own use of CPNI to market its affiliate's services.

Similarly, all carriers must treat their affiliates and intracompany units the same way they treat unaffiliated entities with respect to the use and disclosure of CPNI. The only difference between the position of the BOCs and all other carriers is that the former are governed by the additional nondiscrimination requirement of Section 272(c)(1).

Section 272(g)(3) does not make Section 272(c)(1) inapplicable to the BOCs' use or disclosure of CPNI in the course of joint marketing. Section 272(g)(3) should not be read to immunize every activity that might be used for joint marketing, including CPNI disclosure practices, from the nondiscrimination requirement of Section 272(c)(1). Moreover, Sections 201(b) and 202(a), which are not affected by Section 272(g)(3), prohibit, in circumstances where disclosure is not precluded by Section 222, any withholding of CPNI from other entities that inhibits customer choice or for anticompetitive purposes. Thus, if a BOC discloses or uses CPNI for joint marketing purposes with customer approval, it must disclose CPNI to any other entity that can demonstrate similar customer approval.

MCI explained in its comments that cellular and other CMRS should be treated as a "floating" category for Section 222 purposes. Thus, in the case of a BOC, CMRS would be considered to be in the same category as its local service, and CPNI derived from either of those categories could be used by the BOC or its affiliate to market the other without customer approval. Applied in this manner, Section 222 would not be inconsistent with

Section 22.903(f) of the Commission's Rules. Under the latter provision, any CPNI provided to the BOC's cellular subsidiary must be made publicly available on the same terms and conditions. Section 222 does not preclude such public availability, since, under Section 222(c)(1), such disclosure is "required by law" -- namely Section 22.903(f) of the Rules.

The BOCs have made it fairly clear in this proceeding that they intend to apply their own lax interpretation of Section 222 until rules are issued in this proceeding. Thus, it must be assumed that the vast CPNI resources at their disposal have already been loaded into their marketing databases in preparation for in-region interLATA marketing. Accordingly, the Commission should order all carriers to purge all marketing databases of all CPNI and to create systems to ensure that CPNI is not used in a manner that violates Section 222.

Finally, since electronic publishing is an information service, such services should not be considered part of the same category as either local or interLATA telecommunications services for CPNI purposes. The BOCs' theory that information services are "used in the provision of" telecommunications services within the meaning of Section 222(c)(1)(B) must be rejected, since it is telecommunications services that are used in the provision of information services. Thus, local or interLATA telecommunications service CPNI cannot be used or disclosed for information service purposes in the absence of customer approval or other exception in Section 222.

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FURTHER COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI Telecommunications Corporation (MCI), by its undersigned counsel, hereby responds to the Common Carrier Bureau's Public Notice requesting further comment on certain questions relating to this proceeding (Notice).[1] The questions posed in the Attachment to the Notice explore the interrelationship of Sections 222, 272 and 274 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act).[2]

Introduction

From MCI's point of view, these questions could not have come at a better time. MCI is experiencing a variety of anticompetitive abuses by both the Bell Operating Companies (BOCs) and independent incumbent local exchange carriers (ILECs) that make it extremely important for the Commission to set forth customer proprietary network information (CPNI) rules that fully

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[1] DA 97-385 (released Feb. 20, 1997).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151 et seq.

recognize the relationship of Section 222 to Sections 272 and 274 of the Communications Act, as well as to Sections 201(b) and 202(a) of the Act. The Commission should take special note of the activities of the ILECs in this regard, since their CPNI-related abuses in connection with their current participation in the interLATA services market provides an "early warning" as to what to expect from the BOCs as they apply for in-region interLATA authority.

The Southern New England Telephone Company (SNET) provides a prime example of the type of behavior that, if left unchecked, could stifle competition in both the interLATA and local exchange markets. Market tests by MCI employees have revealed that SNET's interLATA unit, SNET America, Inc., is given access to "universe list" data -- various categories of information about a carrier's subscriber -- that SNET is refusing to provide to MCI, at least in the absence of customer authorization, on the grounds that it includes CPNI. In fact, none of this data constitutes CPNI but is the type of information that is useful both for marketing and for the provision of service, such as local billing name and address, billing telephone number, an indication of whether or not the number is non-published or non-listed, etc. Thus, SNET is not precluded from disclosing such information to MCI. Even if some of the data were CPNI, SNET's disclosure of that data to its interLATA service unit while denying it to MCI is clearly unreasonably discriminatory.

Moreover, as the BOCs become more hopeful about their

possible entry into the in-region interLATA market, they are beginning to adopt similar anticompetitive strategies. For example, US West recently announced to MCI that it would no longer provide universe list data to MCI without customer authorization on the grounds that it includes CPNI. It is extremely important that the Commission not allow the BOCs and ILECs to stifle competition at this crucial juncture through the unreasonable and discriminatory withholding of such information. In its responses below to the questions posed in the Notice, MCI will explain how the interplay of various provisions of the Communications Act, if properly applied, prohibit such conduct.

In framing responses to the Bureau's questions, MCI finds that it cannot answer the questions fully unless it places its responses in a proper context. In particular, the BOCs and AT&T have taken positions in ex parte filings in this docket that would render some of the questions posed in the Notice irrelevant. Other questions appear to be predicated on assumptions that reflect the incorrect positions taken by AT&T and the BOCs. MCI is aware of the caveat in the Notice that the phrasing of questions should not be construed as an indication of the Bureau's views, but some of the assumptions stated in the questions make the questions difficult to answer without some background. Before responding to the individual questions, therefore, it would be useful to respond to the ex parte filings that bear on those questions.

AT&T and the BOCs Would Completely Eviscerate Section 222

AT&T and the BOCs argue that Section 222 was intended primarily as a privacy measure and not to promote competition. Thus, in their view, that provision protects CPNI from disclosure to other entities but not from use by carriers that already possess it.[3] Pacific Bell has submitted a "survey" that purports to demonstrate that consumers are perfectly happy to have their incumbent local service provider have full access to their CPNI but object to making it available to anyone else. This survey supposedly supports interpreting Section 222 in a manner that makes access to CPNI relatively automatic for carriers that already possess it but extremely difficult for others to gain access to it.[4]

This approach is reflected in an extreme interpretation of Section 222 under which all telecommunications services are considered "the telecommunications service from which such [CPNI] is derived" under Section 222(c)(1). Under this interpretation, any CPNI possessed by a carrier would be available for any use by that carrier without customer approval.[5] Meanwhile, other

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[3] See, e.g., ex parte letter from Elridge Stafford, US West, Inc., to William F. Caton, Secretary, Federal Communications Commission (FCC), and Attachments, dated April 4, 1996 (Stafford letter).

[4] See, e.g., ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Dec. 11, 1996, Attachment A.

[5] See ex parte letter from Charles E. Griffin, AT&T, to William F. Caton, FCC, dated Oct. 8, 1996 (Griffin letter), Attachment at 1.

entities must have written authorization under Section 222(c)(2) to gain access to CPNI. Some of the BOCs seem to suggest that the written authorization procedure in Section 222(c)(2) is the primary vehicle for other entities to gain access to CPNI, while Section 222(c)(1) is not intended for that purpose.[6] Pacific Telesis, in particular, defends its approach to Section 222(c)(1) by characterizing that provision as one focussed only on privacy interests, while the mandatory disclosure procedure in Section 222(c)(2) was intended to address competitive concerns.[7] The BOCs also argue that an "implied approval" or "opt out" approval method satisfies the customer approval requirement of Section 222(c)(1).[8]

The BOCs' and AT&T's approaches, however, simply ignore the competitive concerns reflected in Section 222, including Section 222(c)(1). As indicated in the Notice of Proposed Rulemaking initiating this proceeding (NPRM), the legislative history of Section 222 shows that its purpose was to give customers greater control over their CPNI in the face of marketing efforts by carriers moving into new markets as a result of the 1996 Act.

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[6] Ex parte letter from Kathryn Marie Krause, US West, Inc., to William A. Kehoe, III, and Karen Brinkmann, FCC, dated Dec. 2, 1996 (Krause letter), at 2-3; ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Feb. 3, 1997, Attachment at 3.

[7] See, e.g., ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Jan. 16, 1997, Attachments at 11-12; ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Feb. 3, 1997, Attachment at 2-3.

[8] Stafford letter.

Privacy and competitive concerns coincide in precluding carriers already possessing CPNI from using it to facilitate entry into new markets without customer approval. In fact, restricting BOC and BOC affiliates' use of CPNI they already possess as they enter new markets had been the main focus of Section 102 of the Senate bill, from which Section 222 is derived.[9] The legislative history makes clear that in adopting the Senate provisions with modifications, Section 222(c) was simply intended to apply similar protections to CPNI possessed by all carriers, rather than to provide less protection to CPNI in the hands of BOCs.[10] Moreover, it is primarily Section 222(c)(1) that was derived from Section 102 of the Senate bill, since the written authorization procedure in Section 222(c)(2) was added by the conferees.[11]

The BOCs thus have it backwards in arguing that the main focus should be on protecting CPNI from disclosure to other entities. Carriers' exploitation of CPNI they already have is one of the primary threats to the competitive goals of the 1996 Act generally, and Section 222 in particular, as well as to privacy. Not only does the legislative history demonstrate that the restrictions of Section 222(c) were intended to be applied between affiliates and on an intracompany basis generally, but the statutory language also requires such a reading. In the

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[9] See Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 203, 205 (1996)(Joint Explanatory Statement), cited in NPRM at ¶ 24 n. 60.

[10] See Joint Explanatory Statement at 205.

[11] Id.

absence of customer approval, a carrier "that receives or obtains [CPNI] by virtue of its provision of a telecommunications service shall only use ... or permit access to individually identifiable [CPNI] in its provision of" the service from which the CPNI was derived.[12] "Use ... or permit access to" CPNI is something that can only be done by a carrier that already possesses it. Thus, the regulations implementing Section 222 must provide as much protection against the use of CPNI by a carrier that already possesses it as they do against the improper disclosure of CPNI to others.

Given the language and history of Section 222, the consumer survey submitted by Pacific Telesis must be ignored. Even taken on its own terms, the survey is intellectually dishonest, since those conducting the survey carefully avoided asking any questions that might have evoked revealing answers. For example, consumers were not asked about whether local telephone companies should be able to exploit customer information that only they possess by virtue of their monopoly position or whether they should be allowed to exploit such information while denying competitors access to the same information. Putting aside the invalidity of the survey findings, however, and assuming arguendo that consumers care less about use of their CPNI by carriers that already possess it than they do about its disclosure to others, the requirements of the statute must be implemented, especially in light of its competitive goals, which are ignored by the

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[12] Section 222(c)(1)(A).

survey.

The other escape hatches proposed by the BOCs and AT&T are equally invalid. Putting all services into one basket would essentially nullify Section 222(c), since there would be no restrictions on the use of CPNI for marketing any other service. As MCI explained in its comments in this docket, a local service "bucket" and interLATA service bucket, with intraLATA toll and CMRS as "floating" categories, is the service categorization that best comports with the legislative history and goals of Section 222 and the 1996 Act generally.[13]

Similarly, implied or opt-out approval proposals to implement Section 222(c)(1) would accomplish the same result as a single bucket for all services, at least for carriers that already have CPNI. MCI has explained in its comments why customer "approval" under Section 222(c)(1) must, in fact, be an explicit, knowing oral approval.[14] The BOCs' recitations of other instances where opt-out approval has been used are irrelevant here, where there is a specific CPNI protection statute intended to facilitate competition as well as protect information. Furthermore, Pacific's defense of the opt-out procedure -- based on its characterization of Section 222(c)(1) as addressed only to privacy and not competition -- must be rejected, given the overriding legislative goal of limiting the

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[13] MCI Comments at 3-5; MCI Reply Comments at 2-7.

[14] See MCI Comments at 7-11; MCI Reply Comments at 7-10. Written approval would also be acceptable, but should not be required.

"use" of CPNI by carriers already possessing it in order to promote competition. As noted above, it was the precursor to Section 222(c)(1), Section 102 of the Senate bill, that was focussed on restricting BOCs' use of CPNI they already had.

Not only does the opt-out approval procedure ignore the competitive purposes of Section 222(c)(1), but it also shortchanges the privacy goals Pacific professes to uphold, since the rationale for implied or opt out approval is that while CPNI is personal information, it is not extremely sensitive and thus requires only minimal protection.[15] There is therefore no justification for an implied or opt-out approval process, which would result in such "approval" by over 90% of all customers.[16] Such a one-sided procedure would be especially anticompetitive in light of the BOCs' possession of current CPNI for nearly all consumers in their local service regions and AT&T's possession of current CPNI for the vast majority of consumers in the United States.

The BOCs' implication that CPNI generally may not be disclosed to another entity with oral approval under Section 222(c)(1) is also precluded by the language of that provision. It states that "[e]xcept ... with the approval of the customer," a carrier "shall only ... dislose" CPNI in its provision of the

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[15] Letter from Privacy & Legislative Associates to A. Richard Metzger, Jr., FCC, dated Jan. 23, 1997, at 1-16, attached to ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Jan. 24, 1997.

[16] See ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Jan. 16, 1997, Attachments at 3.

service from which the CPNI was derived. That can only mean that, with customer approval, a carrier may disclose CPNI to another entity. That there is another provision, Section 222(c)(2), focussing specifically on disclosure to other entities cannot be construed to displace Section 222(c)(1) with regard to all such disclosures. Section 222(c)(1) allows use or disclosure with customer approval; Section 222(c)(2) requires disclosure with written authorization. Recognizing this clear statutory language, even the BOCs that seem to suggest that other entities may not gain access to CPNI under Section 222(c)(1) ultimately retreat from that view.[17]

With this background, the following responses should be helpful to the Bureau.

Responses to Questions

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of ... services... and information..." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or

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[17] See, e.g., Krause letter at 2 n. 2 ("the written consent requirement [of Section 222(c)(2)] is not an absolute requirement" for disclosure), and at 3 ("Section 222 (c)(2) might not mandate a process requiring a writing before information be sent to third parties").

permission of access to CPNI?

Since the Non-Accounting Safeguards Order[18] held that CPNI is subject to the nondiscrimination requirement of Section 272(c)(1),[19] whatever procedures are followed with regard to the use of local service CPNI by a BOC in connection with the marketing of its affiliate's interLATA service, or with regard to the disclosure of local service CPNI to the BOC's interLATA affiliate, must also be followed with regard to the disclosure of local service CPNI to an unaffiliated interexchange carrier (IXC) or any other entity. This rule is especially significant in situations where a carrier may, but is not required to, disclose CPNI under Section 222. As discussed above, Section 222(c)(1) allows, but does not require, a carrier to use or disclose CPNI "with the approval of the customer," and Section 222(d)(1) allows CPNI to be disclosed without customer approval "to initiate, render, bill and collect for telecommunications services."[20]

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[18] First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (released Dec. 24, 1996).

[19] Id. at ¶ 222.

[20] MCI asserted in its comments that the service or services governed by the exception in Section 222(d)(1) must be the same service or the same service category as the service from which the CPNI was derived. Upon further reflection, however, MCI has concluded that Section 222(d)(1) permits a carrier to use or disclose CPNI "to initiate, render, bill and collect for telecommunications services" different from the service from which the CPNI was obtained. Thus, as US West concedes (see Krause letter at 2 n.2), a LEC may disclose local service CPNI to

Thus, a BOC **may** disclose CPNI to an unaffiliated IXC or other entity where that entity has the customer's oral approval or where the entity needs such CPNI to initiate service. The nondiscrimination provision of Section 272(c)(1), however, **requires** the BOC to disclose CPNI to the other entity in these situations if it discloses CPNI to its separate affiliate under the same conditions (**i.e.**, where the customer has orally approved or where disclosure is necessary to initiate service). An entity seeking such disclosure under Section 222(c)(1) should be permitted to demonstrate that it has obtained the customer's oral approval by any reasonable means, such as through third-party verification (TPV). Similarly, where the entity seeks disclosure under Section 222(d)(1), it should be permitted to demonstrate that the customer has chosen its service by any reasonable means, including TPV, and should be permitted to communicate such TPV or other indicia of customer commitment to the BOC in electronic batch mode.

Moreover, BOCs are subject to similar nondiscrimination requirements even prior to the creation of a separate Section 272 affiliate or obtaining in-region authority. All carriers' use of CPNI is also subject to the requirements of Sections 201(b) and 202(a) of the Act. Thus, where a BOC may, but is not required to, disclose CPNI to another entity, it may not unreasonably

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an IXC in order to enable the IXC to initiate, render, bill and collect for interLATA services. **See also**, Griffin letter, Attachment at 2-3.

withhold access to such CPNI, or impose any requirements on its disclosure for anticompetitive purposes or that impede customer choice.

Such practices are unreasonable under Section 201(b), irrespective of whether they constitute discrimination and whether or not the BOC is authorized to provide interLATA service or has a separate interLATA affiliate. In assessing whether a particular practice with regard to disclosure of CPNI is unreasonable under Section 201(b) or simply constitutes reasonable steps to protect customers' privacy, the most telling factor would be the practices the BOC ultimately intends to adopt with regard to disclosure of CPNI to its own interLATA affiliate. If, for example, it intends to provide CPNI to its affiliate with the customer's oral approval or in order for the affiliate to initiate service, without written authorization, the only conceivable reason not to follow the same procedure for other IXCs, prior to in-region authority, is to inhibit customer choice and competition, in violation of Section 201(b). Protecting customers' privacy would have nothing to do with such manipulative inconsistency.

Such manipulation would also constitute unreasonable discrimination under Section 202(a). Assume, for example, that a BOC refuses to provide CPNI to other IXCs prior to the time it receives in-region authority, even where an IXC has oral customer approval for such disclosure or needs the CPNI to initiate service. If such a BOC were to alter its CPNI disclosure

practices once it received in-region authority, the only reason for such a change would be to benefit its own affiliate, since its entry into in-region interLATA service would be the only intervening variable in that situation. Such prior refusal to disclose CPNI to other IXCs -- in light of a change in practices once freer disclosure could benefit the BOC's affiliate -- would be unreasonably discriminatory. The change in practices might benefit other IXCs as well as the BOC's affiliate, but the main beneficiary would be the BOC's affiliate, and that benefit would be the only motivation for the change.

Any BOC that started disclosing CPNI once it entered the in-region market would also not be operating independently of the affiliate, as required by Section 272(b)(1) of the Act. Such lack of independence would be further confirmation of the discriminatory intent of the change in practices.

Accordingly, the Commission, in its order implementing Section 222, should make it clear that a BOC that has refused or refuses to disclose local service CPNI to another entity where Section 222 allows such disclosure -- e.g., where there is oral customer approval or where the CPNI is necessary to initiate service -- must continue to follow the same approach with regard to CPNI disclosure to its own affiliates. Without such a prophylactic rule, BOCs will simply manipulate the CPNI disclosure process for anticompetitive ends as long as they can before entering the in-region interLATA service market, at which time they will alter their practices for their own convenience.

Moreover, the same rule should apply to a BOC's own use of local service CPNI to market its affiliate's interLATA services. Otherwise, a BOC could make an end run around any Section 201(b)/202(a) prophylactic rule by impeding other IXCs' use of CPNI prior to its entry into in-region interLATA service and then giving its own affiliate the benefit of freer use of the same CPNI in marketing the affiliate's services.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

As explained above, a carrier "may disclose a customer's CPNI to a third party" either with oral approval under Section 222(c)(1) or in order to initiate service under Section 222(d)(1). A carrier "shall disclose [CPNI] upon affirmative written request by the customer" under Section 222(c)(2). Thus, a BOC may disclose CPNI to a third party under a variety of situations, not just pursuant to an affirmative written request under Section 222(c)(2). This is an important point, since, as discussed above, the BOCs are attempting to unreasonably deny access to CPNI based on arguments that misrepresent Section

222(c)(1) as a vehicle for carriers to gain easy access to their customers' CPNI while denying it to all others.

Accepting the premise of the question, however, the answer is yes: a BOC's Section 272 affiliate must be treated as a third party for purposes of applying Section 222. The separation requirements of Section 272(b), especially the independent operation requirement of Section 272(b)(1), and the nondiscrimination provision of Section 272(c)(1) requires such treatment. A BOC and its separate affiliate would not be operating independently if they shared CPNI, free of the strictures of Section 222. Moreover, a BOC would be favoring its affiliate if it were to provide CPNI to the affiliate under any different criteria from those governing its provision of CPNI to all others. It should be kept in mind, however, that, as explained above, the CPNI protections apply on an intracompany basis as much as they do between different entities.

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written

requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

With the same qualification as in MCI's response to Question 2, the answer is yes, although not for the reason assumed in the question: all carriers must treat their affiliates and intra-company units the same way they treat unaffiliated entities with respect to the use and disclosure of CPNI. As explained above and in MCI's comments, a "bucket" approach to service categories is the best way to carry out the intent and language of Section 222. The only possible way to carry out such an approach and the Congressional intent to restrict carriers' use of CPNI they already possess is to apply the protections of Section 222, especially Section 222(c)(1), on an intracompany basis as well as between different entities. All of these reasons apply to BOCs and their affiliates as much as to any other carrier. Thus, the answer to this question is the same as the answer to Question 2, except that in the case of the BOCs and their affiliates, the requirements of Section 272 provide an additional reason to treat them as separate entities.

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its

section 272 affiliate? If for example a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose(i.e., opt-out approval) is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

For the reasons discussed above, and with the same qualification,[21] the answer is yes. Where a BOC may disclose CPNI to its separate affiliate (e.g., where the customer has orally approved under Section 222(c)(1)), the nondiscrimination provisions of Section 272(c)(1) as well as Sections 201(b) and 202(a) require the BOC to disclose CPNI to unaffiliated entities on the same basis.

Accordingly, Pacific Telesis is incorrect in stating that "a carrier may use a notice and opt out procedure to obtain approval for its own use of CPNI, but require written approval for disclosure to third parties."[22] That is precisely what a carrier may not do under Sections 201(b) and 202(a) of the Act and a BOC absolutely may not do under Section 272(c)(1). As explained above, a notice and opt-out procedure would not

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[21] The qualification goes to the assumption in the question. Under Section 222(c)(1), oral, not written, "approval" allows a carrier to use, disclose, or permit access to CPNI. Under Section 222(c)(2), "written authorization" requires disclosure.

[22] Ex parte letter from Gina Harrison, Pacific Telesis, to William F. Caton, FCC, dated Feb. 3, 1997, at 3.